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8 BEFORE THE CALIFORNIA
9 STATE WATER RESOURCES CONTROL BOARD

10
11 In the Matter of Draft Cease and Desist Order No.
12 2008-00XX-DWR Against California American
13 Water Company

**SIERRA CLUB’S REPLY TO CALIFORNIA-
AMERICAN WATER REQUEST FOR
CLARIFICATION AND MOTION FOR
TEMPORARY POSTPONEMENT OF
PROCEEDINGS**

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16 In its Request for Clarification, filed with the Board May 21, Cal-Am reiterates its
17 bold contention that this Board has authorized its diversions conditional on its compliance
18 with Order 95-10:

19 “Under [Water Code] Section 1052, a diversion or use of water is a
20 trespass if it is not “authorized.”...Authorization can come from any action
21 undertaken pursuant to Division 2 of the Water Code (Section 1000, et seq.). Id.
22 It should be beyond reasonable debate that, through Order 95-10, and not through
23 the issuance of a permit, the State Water Board authorized diversions as an
24 interim physical solution. In that Order, the State Water Board authorized CAW
25 to divert no more than 14,106 acre-feet per year, subject to CAW satisfying the
26 conditions established therein.” Request for Clarification, p.2 (emphasis added).

27 Cal-Am’s bold, if not reckless argument, stands state water law on its head, and renders
28 superfluous the carefully crafted measures relating to obtaining permits for the diversion of waters of

1 the State. Virtually every other water purveyor in the State of California has a permit to appropriate
2 water (or a pre-1914 right). Cal-Am has had every opportunity to legalize its appropriations, as
3 Condition 2 of Order 95-10, invited it to do. Instead it has chosen, at its risk, not to go the route of
4 legalizing its water diversions, as virtually every other water purveyor has done. Its attempt to convert
5 a sow's ear (its continuing trespass) into a silk purse (this Board's blessing) must be clearly rejected.
6 Notably, Cal-Am cites no specific section of the Water Code that confers any such "authorization." If
7 such "authorization" has taken place, the Board has implicated itself in authorizing diversions that
8 have resulted in unlawful takings of SCCC steelhead (District Population Segment) in violation of the
9 takings provisions of the Endangered Species Act, 16 USC § 1538.

10 Water Code §1225 provides:

11 "No right to appropriate or use water subject to appropriation shall be
12 initiated or acquired except upon compliance with the provisions of this division."

13 Section §1225 provides an exclusive mechanism for obtaining a right to use water from stream waters.

14 Crane v. Stevinson, 5 Cal.2d 387, 398 (1936). To the extent that Water Code §1052 provides that:

15 "The diversion or use of water subject to the provisions of this division other
16 than as authorized in this division is a trespass..."

17 the words "other than as authorized" reference Water Code §1225 as the exclusive modality for
18 obtaining a water right. In Meridian v. San Francisco, 13 Cal.2nd 424, 450 (1939) the Supreme
19 Court cited Water Code §1052 as ensuring there would be no apprehension that rights could
20 otherwise become vested, by prescription or otherwise, "in an excessive use of water or in a use
21 for an unauthorized purpose." Hutchins, The California Law of Water Rights, 98 (1956).

23 The diversion of water without first obtaining a permit from the Board constitutes a
24 trespass within the meaning of Water Code §1052. People v. Shirokow, 26 Cal.3d 301 (1980).
25 The State is authorized to seek injunctions against such trespasses. Id., 304. After reciting that
26

1 since 1923 the statutory procedure (Water Code §1225) became the exclusive means of
2 acquiring appropriative rights, the Court declared:

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4 “These declarations of policy, together with the comprehensive
5 regulatory scheme set forth in section 1200 et seq., demonstrate a legislative
6 intent to vest in the Board expansive powers to safeguard the scarce water
resources of the state.” 26 Cal.3d at 309.

7 The Court also restated the long-standing rule that property held by the state in trust for
8 the people cannot be lost through adverse possession, citing Hoadley v. San Francisco (1875),
9 50 Cal.265, 274-276. 26 Cal.3d at 311. See also Santa Clarita Water Co. v. Lyons (1984), 161
10 Cal.App.3d 450 (where a water company never applied for a permit or license from the Board to
11 take water from the subject property, it is “not an appropriator...[but] merely a negligent
12 trespasser” in violation of Water Code §1052).¹

13
14 Water Code, Division 2 (§§1000-5976), gives no authority to the Board to “authorize” or
15 legalize diversions for which no appropriation permit exists. Water Code §2100 confers limited
16 authority on the Board to file actions in the Superior Court to impose physical solutions to protect the
17 quality of ground-water. No section in the Water Code confers authority on the Board to order a
18 temporary physical solution that would “authorize” otherwise illegal diversions that require an
19 appropriation permit. As the Supreme Court has made clear in City of Barstow v. Mojave Water
20 Agency, 23 Cal.4th 12,24 (2000), there are constitutional constraints on the superior courts in imposing
21 a physical solution with respect to ground-water adjudications. The Court stated:
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25 ¹ Water Code §1825 provides:

26 “It is the intent of the Legislature that the state should take vigorous action to enforce the terms and conditions of
permits...to appropriate water, to enforce state board orders and decisions, and to prevent the unlawful diversion of water.”

1 “In ordering a physical solution, a court may neither change priorities among
2 water rights holders nor eliminate vested rights in applying the solution without first
3 considering them in relation to the reasonable use doctrine.”

23 Cal.4th at 1250

4 Similar constraints apply to the Board with respect to physical solutions with respect to
5 conflicts among beneficial uses. Just as the courts cannot disregard prior legal water rights or existing
6 water rights, under the state’s administrative scheme for recognizing water rights, the Board cannot
7 “create” or license water use absent express legislative authority or ignore priority rights of other users
8 on the Carmel River. City of Barstow, id. Certainly, the Legislature has purported nowhere in the
9 Water Code to confer such authority on the Board. (The existence of Water Code §2100 indicates that
10 the Legislature has conferred only very limited authority on the Board with respect to physical
11 solutions). Had the Legislature intended the Board to enable “trespassers” to engage in “temporary
12 physical solutions” at the expense of continuing damage to public trust resources (and in violation of
13 the ESA) and to foreclose additional relief so long as the conditions were complied with, it would have
14 addressed this in Division 2 of the Water Code. It did not.

15 Sierra Club opposes any delay in the proceedings, and requests that Cal-Am’s request for delay
16 be denied.

17 Dated: May 21, 2008

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21 By: _____
22 LAURENS H. SILVER
23 Attorney for SIERRA CLUB
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1 **PROOF OF SERVICE**

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3 I declare as follows:

4 I am over 18 years of age and not a party to the within action; my business address is P.O. Box
5 667, Mill Valley, CA, I am employed in Marin County, California.

6 On May 21th, 2008, I served a copy of the foregoing following document entitled

7
8 **SIERRA CLUB'S OPPOSITION TO MOTION BY CALIFORNIA-AMERICAN WATER
COMPANY TO STRIKE PORTIONS OF PRE-HEARING BRIEFS**

9 Following interested parties in the above-referenced document to the following:

10 **See attached Service List**

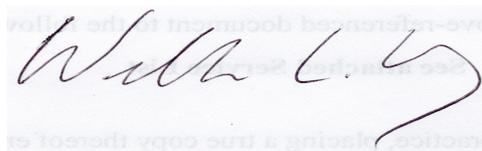
11 BY MAIL

12 By following ordinary business practice, placing a true copy thereof enclosed in a sealed envelope,
13 for collection and mailing with the United States Postal Service where it would be deposited for
14 first class delivery, postage fully prepaid, in the US Postal Service that same day in the ordinary
course of business as indicated in the attached Service List, to any party who has not consented to
email service.

15 BY ELECTRONIC MAIL

16 I caused a true and correct scanned image (PDF file) copy to be transmitted via the electronic mail
17 transfer system to the email address(es) indicated in the attached Service List of Participants, who
have consented to email service.

18 I certify under penalty of perjury under the laws of the State of California that the foregoing is
19 true and correct and that this declaration was executed on May 21th, 2008, at Penn Valley, California.
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Willow L. Wray

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1 **CALIFORNIA AMERICAN WATER CEASE AND DESIST ORDER**
2 **JUNE 19, 2008 HEARING**
3 **SERVICE LIST OF PARTICIPANTS**

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